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Nos. 07-1059, 07-1078

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EURODIF S.A., *et al.*,

Respondents.

USEC, INC., *et al.*,

Petitioners,

v.

EURODIF S.A., *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF THE NATIONAL ATOMIC COMPANY "KAZATOMPROM" AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE* [1]

The National Atomic Company "Kazatomprom" ("Kazatomprom") is the state-owned national nuclear company of the Republic of Kazakhstan. It is responsible for the exploration, mining, production and sale of Kazakhstan's uranium resources for use in the worldwide nuclear fuel cycle, as well as for the development of other mineral resources of the Republic of Kazakhstan. Kazakhstan is estimated to have more than fifteen percent of the world's total reserves of uranium. It is expected by 2010 to be the world's leading uranium producer. It is already one of the largest exporters of natural uranium to the United States, and a substantial percentage of its uranium production is ultimately used by power companies in the United States.

Kazatomprom and the Republic of Kazakhstan are committed to the production and use of uranium for peaceful purposes. When it achieved independence on December 25, 1991, Kazakhstan found itself with one of the world's largest arsenals of nuclear weapons. Working in cooperation with the United States, Kazakhstan voluntarily dismantled its entire nuclear arsenal – totaling approximately 1,300 nuclear warheads, along with delivery systems – making it the first nation ever to destroy all of its nuclear weapons voluntarily.

Kazakhstan promptly joined the Nuclear Non-Proliferation Treaty as a non-nuclear weapon state.

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[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity other than *amicus curiae*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Written consent of the parties to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

It is a member of the International Atomic Energy Agency and is a participating government in the Nuclear Suppliers Group. Kazakhstan has also entered into an agreement in principle with the United States to assist in the blending down of weapons-grade uranium to nuclear fuel to be used for peaceful purposes. Kazakhstan has signed bilateral agreements with the United States and the European Community on cooperation in the spheres of nuclear safety and the peaceful use of atomic energy. All Kazatomprom exports of uranium unconditionally comply with the terms of the Nuclear Non-Proliferation Treaty, the rules and standards of the International Atomic Energy Agency, and all Nuclear Suppliers Group Guidelines.

Kazakhstan's uranium is fairly traded. Kazakhstan was investigated and prevailed in a dumping proceeding under the U.S. antidumping laws involving its sales of uranium to the United States. As a result, uranium from Kazakhstan may be sold to U.S. companies and imported into this country free from dumping duties.[2]

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[2] On December 23, 1991, two days prior to the breakup of the Soviet Union, the United States International Trade Commission issued a preliminary determination that the Soviet Union was selling uranium at less than fair value in violation of U.S. dumping law. *Investigation No. 731-TA-539 (Preliminary); Uranium From the U.S.S.R.,* 57 Fed. Reg. 68 (Jan. 2, 1992). That preliminary determination was applied to Kazakhstan and the other newly formed former Soviet Republics that produced uranium. As a result, Kazakhstan was born facing a preliminary dumping determination. As a temporary solution, Kazakhstan entered into a Suspension Agreement with the United States under which it agreed to limit its uranium sales to the United States. *Antidumping; Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan;*

Kazakhstan does not itself have facilities to enrich uranium. It sells its uranium to utilities, including utilities in the United States, which then enter into contracts with service providers to have this non-dumped uranium enriched so that it can be used in the utilities' nuclear reactors to produce electricity for consumers.[3] As mentioned, a substantial portion of Kazatomprom's uranium is ultimately used by utility companies in the United States.

Kazatomprom has a significant interest in ensuring that the U.S. government does not reach beyond the unambiguous limitations of U.S. anti-dumping law to unlawfully apply antidumping duties to enrichment services. Such a decision would force U.S. utilities and U.S. consumers, in effect, to pay antidumping duties on non-dumped Kazakh uranium, unless they choose to have that uranium enriched by USEC, which is the sole U.S. provider of enrichment services. Reversing the decision below

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Suspension of Investigations and Amendment of Preliminary Determinations, 57 Fed. Reg. 49220 (Oct. 30, 1992). Kazakhstan strictly honored its obligations under the agreement while it was in effect. Kazakhstan terminated the agreement in November of 1998, to allow the dumping investigation to proceed so that Kazakhstan could obtain a final, country-specific determination under the law. Kazakhstan prevailed in that final determination. *Uranium from Kazakhstan*, Investigation No. 731-TA-539-A (Final), USITC Publ'n No. 3213 (July 1999).

[3] Low enriched uranium is produced from solid uranium oxide (U_3O_8 or yellowcake), refined to uranium dioxide, converted into a gas (uranium hexafluoride gas or UF_6), and enriched to increase the concentration of the radioactive isotope sufficient to achieve fission. The Fuel Cycle in Brief, http://www.world-nuclear.org/how/fuelcycle.html.

would effectively impose an additional cost on fairly traded Kazakh uranium and disrupt the business relationships between Kazatomprom and its U.S. utility customers. It would also place an additional burden on U.S. consumers at a time when nuclear power is increasingly seen as a safe and economic alternative to high-priced foreign oil.

SUMMARY OF ARGUMENT

A reversal of the Federal Circuit's decision below[4] on the basis urged by Petitioners would give U.S. authorities unprecedented power to expand the U.S. antidumping law beyond the limits imposed by its text. That law is a limited exception to the general internationally negotiated rules designed to liberalize global trade and proscribes only very specific kinds of behavior not present here. Moreover, expanding the law to behavior it unambiguously does not reach, as Petitioners seek, would place a significant burden on U.S. energy consumers.

Specifically, the Government is asking this Court to rule that it may apply antidumping duties under 19 U.S.C. § 1673 to contracts for enrichment services. As found by the Federal Circuit and the Court of International Trade below, the U.S. antidumping law clearly applies only to dumped sales of foreign merchandise in the United States and thus does not apply to contracts for enrichment services.

Petitioners argue that, in order to fulfill the "purpose" of the statute and prevent opening a "loop-

[4] *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir. 2005) (Pet. App. 8a-28a), *aff'd on reh'g*, 423 F.3d 1275 (Fed. Cir. 2005) (Pet. App. 29a-35a), *final judgment*, 506 F.3d 1051 (Fed. Cir. 2007) (Pet. App. 1a-7a).

hole," the Court must interpret the statute to permit subjecting contracts for enrichment services to dumping duties. Changing a law to expand its reach, however, is a task for Congress—not this Court—when the statute's text is unambiguous.

Moreover, Petitioners' articulation of the "purpose" of the law is incomplete and misleading. The U.S. antidumping law is a limited exception to the trade liberalization that has been the undisputed goal of several rounds of multilateral trade negotiations. That exception is carefully spelled out in international agreements to which the United States is a party, and in the U.S. laws that were enacted by Congress specifically to implement those agreements. The antidumping law is not some broad protectionist catch-all provision as described by Petitioners. Rather, it is a carefully worded statute designed to address well-defined behavior and to do so in accordance with U.S. international obligations. The Court would best fulfill that purpose by respecting the statute's express limitations.

Such careful attention to the statute's text is especially important here because impermissibly including uranium enrichment services within the scope of the antidumping statute could have a profoundly negative effect on U.S. interests. There is only one U.S. entity that provides enrichment services: USEC, one of the Petitioners. As a practical matter, applying dumping duties to contracts for enrichment services would mean less competition for USEC, which would be free to charge higher prices for such services.[5] While reduced price competition

[5] Indeed, if this Court accepts the Government's reading of the statute, more than 60 percent of the world capacity for enrichment services – and more than 75 percent of enrichment capacity outside the United States – would be subject to dump-

would be a tremendous boon for USEC, its windfall would come at a high price: U.S. nuclear power companies would be forced to pay more for enrichment, thereby exacerbating the rising energy costs that are already an increasing burden for millions of Americans today.

The potential ramifications for U.S. interests counsel against accepting the interpretation of the antidumping law urged by Petitioners, especially when it represents a radical departure from both the statute's text and its historical application. Congress – not the judiciary – is the proper branch of government to weigh and evaluate the complex and wide-ranging issues of international law, trade policy, and energy policy at the heart of this dispute, and decide whether to expand the antidumping laws beyond their present scope to encompass uranium enrichment.

The Court should thus affirm the decision below.

ARGUMENT

I. UNDER THE PLAIN TERMS OF THE STATUTE, URANIUM ENRICHMENT SERVICES ARE NOT SUBJECT TO DUMPING DUTIES

The antidumping statute by its terms applies only to foreign merchandise sold in the United States. The statute provides that dumping duties may be imposed on the basis of a determination that "foreign merchandise is being, or is likely to be, sold

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ing penalties. Russia accounts for more than 53 percent of non-U.S. enrichment capacity. France accounts for another almost 23 percent of non-U.S. global capacity. *See* European Comm'n, *Euratom Supply Agency – Annual Report 2007* 13 (2007), http://ec.europa.eu/euratom/ar/last.pdf.

in the United States at less than its fair value." 19 U.S.C. § 1673(1).[6]

Petitioners do not dispute that the statute requires a sale of merchandise at less than fair value. They argue, however, that Eurodif's enrichment of uranium for utility companies should be treated as a sale of merchandise because it enables the utilities to acquire low enriched uranium, the product that is subject to the investigation.[7] But the only sale Eurodif has made is a sale of its services – of enriching uranium. Eurodif has no right to the underlying uranium, no right to designate to whom the ultimate product produced as a result of its services should be delivered, or at what price it should be sold. It is simply providing the owner of that uranium with the service of enrichment. Enrichment is certainly an important process, but is not a sale of merchandise.

Indeed, the Commerce Department's current contention that Eurodif's provision of enrichment services constitutes a sale of merchandise is directly contrary to its prior interpretation of the statute. As

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[6] The Federal Circuit has consistently held that the statute plainly requires the sale of foreign merchandise in the United States and that, because the terms "sale" and "sold" are clear on their face, there is no reason to defer to the agency in the definition of those terms. *See, e.g., AK Steel Corp. v. United States*, 226 F.3d 1361, 1371 (Fed. Cir. 2000). ("Since there can be no real ambiguity about these terms ["sale" and "seller"], contrary to the assertions of the appellees, we are not required to do any analysis under the second part of the *Chevron* test."); *NSK Ltd. v. United States*, 115 F.3d 965, 974 (Fed. Cir. 1997) (rejecting the argument the court should defer to the government's interpretation of the word "sale" because it was necessary to "prevent[ ] a loophole in the antidumping law . . . ").

[7] *See* Brief for the United States ("Gov. Br.") at 28-29.

the Department previously stated: "The single 'relevant sale' must be a sale by the company that owns the merchandise entirely, including all essential components, can dispose of the merchandise at its own discretion, and, thus, controls the pricing of the merchandise and not merely the pricing of certain portions of production."[8] As the Department went on to explain, a subcontractor which "performs one or more segments of the manufacturing process" is not a seller of the merchandise:

> [W]hile the subcontractor may control the sale of its subcontracting services, it cannot control the sale of the merchandise itself . . . . [A]lthough a subcontractor may deliver to the contractor a product which, based on its characteristics, is subject merchandise, the price paid to the subcontractor . . . is only for the work performed by the subcontractor; that is, the sale by the subcontractor is only a sale of the service it performed . . . . [W]e do not consider the "sale" between the subcontractor and

[8] Response to Court Remand, *Taiwan Semiconductor Mfg. Co. v. United States*, 100 F. Supp. 2d 1109 (Ct. Int'l Trade 2000) (No. 98-05-02184), http://ia.ita.doc.gov/remands/00-48.htm. *See also Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Dynamic Random Access Memory Semiconductors of One Megabit and Above ("DRAMs") From Taiwan*, 64 Fed. Reg. 28983, 28986 (May 28, 1999); *Certain Pasta from Italy: Preliminary Results of New Shipper Antidumping Duty Administrative Review*, 63 Fed. Reg. 53641, 53642 (Oct. 6, 1998).

> such a contractor to be a sale of subject merchandise at all.[9]

That reasoning is directly applicable here. Although Eurodif may deliver a product to the utility which, based on its characteristics, is the merchandise subject to the investigation, the only thing Eurodif has sold, and the only thing for which it is being paid, is its enrichment services.[10] It has not

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[9] *Id.* *See also Taiwan Semiconductor Mfg. Co. v. United States*, 143 F. Supp. 2d 958, 966 (Ct. Int'l Trade 2001) (holding manufacturing services contracts are not goods for purposes of the dumping law; *Barseback Kraft AB v. United States*, 36 Fed. Cir. 691, 705 (1996), *aff'd,* 121 F.3d 1475 (Fed. Cir. 1997) ("It is clear, then, from the process itself, that the [uranium enrichment] customers are contracting for services, not goods . . . . ").

[10] Because of the absence of a sale of merchandise by Eurodif, the Commerce Department was forced to engage in a totally unprecedented and artificial analysis to determine whether Eurodif had sold merchandise at less than fair value. It recognized that it could not compare the prices that Eurodif charged for enrichment services to its U.S. utility customers and others, because enrichment is only a service not subject to the investigation. It therefore had to construct a price for the product, low enriched uranium, that was subject to the investigation. As it said, it "translated prices and costs involved in the SWU [service] contracts to an LEU [product] basis." *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Low Enriched Uranium from France*, 66 Fed. Reg. 36743, 36746 (July 13, 2001). But since Eurodif did not sell that product, there were no prices to compare. To get around this, Commerce artificially constructed a sale adding a value for a natural uranium component (that was not based on what any party actually paid) to both the U.S. and foreign sides of the equation and also added costs to the foreign side of the equation. This methodology was unprecedented, had no basis in the statute and was purely the result of the Department's attempt to apply the antidumping

made a sale of merchandise subject to the antidumping law.

II. COURTS DO NOT RE-WRITE UNAMBIGUOUS STATUTES

Even if Petitioners had a credible basis for arguing that the application of the statute only to sales of merchandise and not to enrichment services somehow undermined the statute's "purpose" and created a "loophole," that would not give the Court leave to re-write the terms of the statute, which are clear and unambiguous on their face.[11] *See, e.g.*, *K*

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laws to a transaction to which they do not apply. Like Procrusteus, finding that the transaction did not fit, Commerce simply stretched it to fit the bed.

[11] Petitioners' claims that widespread evasion of the dumping laws will occur if the purported "loophole" is not closed appear apocryphal. *See* Gov. Br. at 34. For example, their assertion that purchasers are likely to ship massive quantities of iron ore or slabs of steel or trees to other countries to be fabricated to avoid the dumping laws is fanciful. The costs of doing so would be prohibitive.

Petitioners are also attempting to misuse the dumping laws when they argue that the Court should interpret those laws to force Russia to devote its enrichment capacity to the low-profit work of blending down highly enriched uranium under the U.S. Russia HEU agreement. Petitioners argue that the Federal Circuit's interpretation will enable Russia to make much more money through the high-profit work of enriching uranium commercially for utilities, and the Court should interpret the law to stop that. *See* Gov. Br. at 38-39. But that argument turns the dumping law on its head. The purpose of that law is to prevent unfairly low-priced and below-cost sales of products into the U.S. market. It is a perversion of the law to use it to prevent foreign manufacturers from making high-profit sales, and it is particularly wrong when the effort is made, as here, to extend the law beyond sales of products to contracts for services. There are many valid ways for the government to

Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("If the statute is clear and unambiguous 'that is the end of the matter . . . . '"). The judiciary is not the proper branch of government to which such arguments should be directed. *See, e.g.*, *Hanover Bank v. Comm'r*, 369 U.S. 672, 682 (1962) (noting that the government's argument "that the statute has created a tax loophole of major dimension that should be closed . . . might have been persuasive in securing enactment of the amendments to the statute . . . [but] . . . may not, of course, have any impact upon our interpretation of the statute under review"); *Iselin v. United States*, 270 U.S. 245, 250-51 (1926) ("The statute was evidently drawn with care. Its language is plain and unambiguous. What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."); *see also Pavone v. Citicorp Credit Servs., Inc.*, 60 F. Supp. 2d 1040, 1048 (S.D. Cal. 1997) ("Pavone argues, in essence, that the purpose of the FDCPA will be frustrated if Citicorp can simply organize its corporate activities so as to avoid the coverage of the statute . . . . While Pavone's suggestions for closing this loophole in the FDCPA may be well taken, they must be directed to Congress as this Court has no power to rewrite the statute.").[12]

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provide incentives for Russia to blend down highly enriched uranium under the HEU agreement; misinterpreting the antidumping statute is not one of them.

[12] Petitioners cite to Congress's 1984 amendment of the statute to include leasing arrangements as evidence that the term "sale" in the statute should be interpreted expansively. *See* Gov. Br. at 30-31. What the amendments show, however, is

Petitioners are similarly incorrect in arguing that this Court must defer to the Commerce Department's interpretation of the statute under *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.,* 467 U.S. 837 (1984). *Chevron's* deference is appropriate only when "the statute is silent or ambiguous with respect to the specific issue," or, in other words, when "Congress has explicitly left a gap for the agency to fill . . . . " *Id.* at 843. The specific issue here, simply stated, is whether the statute applies to a transaction that does not involve a sale of merchandise. But the statute by its express terms extends only to sales of merchandise. There is no ambiguity – no purposeful "gap" Congress left for the agency to fill – and thus no basis for *Chevron* deference.

III. THE ANTIDUMPING LAW IS NOT A BROAD MEASURE THAT SHOULD BE INTERPRETED EXPANSIVELY TO PROTECT U.S. MANUFACTURERS, BUT A LIMITED EXCEPTION TO THE GENERAL INTERNATIONALLY NEGOTIATED RULES DESIGNED TO LIBERALIZE TRADE AND ELIMINATE TARIFFS

The government's argument – in effect, that the antidumping law is a broad remedial statute that should be interpreted expansively to protect domestic industries – is simply wrong. As Professor John Jackson has pointed out, the antidumping law "is

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that, when Congress wanted to expand the scope of the statute beyond its plain terms, it did so explicitly. Indeed, with respect to similar laws that restrict their application only to "goods" or "merchandise," Congress has recognized the need to pass amendments if a service is going to be covered. *See, e.g.*, Trade Adjustment Assistance Protection Act, H.R. 3801, 110th Cong. (1st Sess. 2007) (amending trade adjustment assistance to cover workers in service fields in addition to those currently covered who produce "goods").

something of an anomaly: in essence it is an 'exception' to GATT [the General Agreement on Tariffs and Trade], allowing certain measures that would otherwise be a violation of the GATT." John H. Jackson, *World Trade and the Law of GATT* 411 (1969). As Professor Jackson emphasized, "the circumstances in which these measures are allowed are . . . carefully circumscribed." *Id.*

By way of background, our current international trading system was developed largely in reaction to what were perceived to be the mistakes made by various nations prior to World War II in increasing tariffs. Increased tariffs, enacted in the early 1930s in the United States under the Smoot-Hawley Tariff Act and under comparable measures elsewhere, led to sharp declines in international trade. Many believed that these trade restrictions had the effect of deepening the Great Depression and were thus one of the causes that led to World War II. Following the end of the war, "[p]olitical leaders in the United States and elsewhere" were committed to "establishing post-war economic institutions that would prevent these mistakes from happening again." John H. Jackson, *The World Trading System* 36 (2d Ed. 2000). The negotiation of the GATT, and the establishment of the World Bank and the International Monetary Fund, were three pillars of the post-World War II economic system. *See* Raj Bhala & Kevin Kennedy, *World Trade Law* 1 (1998).

GATT was originally entered into in 1947 by the United States and 22 other nations. Its principle purpose was the reduction of global trade barriers and, particularly, tariff barriers on trade in goods. Since then, the member states have met periodically to pursue these goals and further reduce trade barriers, and have created an international

organization and body of laws to protect those tariff reductions from erosion and to formalize rules for the regulation of international trade among member states. More than 140 nations are GATT signatories today. From the outset, the United States has been a supporter and leader of GATT and of its efforts to reduce trade barriers around the world.

As Professor Jackson explained, the antidumping laws are a limited exception to the trade liberalization that has been the undisputed goal of GATT and its several rounds of multilateral trade negotiations. That law is not a broad, catch-all provision that may be expanded to protect domestic industry. Rather, it is a narrowly worded statute designed to address carefully circumscribed behavior. It should not be expanded beyond its plain terms to intrude on the general purpose of GATT to reduce barriers to trade.

In furtherance of GATT's primary objective of reducing trade barriers, the member states have amended the agreements permitting imposition of dumping duties, imposing additional limitations on the exception. It is widely recognized that "[t]he Uruguay Round made antidumping and countervailing duty cases more difficult to bring, win, and maintain." *See* Paul C. Rosenthal & Robert T.C. Vermylen, *The WTO Antidumping and Subsidies Agreements: Did the United States Achieve Its Objectives During The Uruguay Round?*, 31 Law & Pol'y Int'l Bus. 871, 885 (2000) (*citing* Michael D. Esch & Daniel E. Waltz, *The Impact of the Uruguay Round Amendments on U.S. Antidumping Law,* 5 Fed. Cir. B.J. 393 (1995)). The amendments reflect that antidumping law applies narrowly to certain specific situations. *See, e.g.*, Agreement on Implementation of Article VI of the General Agreement of Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh

Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of Uruguay Round (1994) art. 2.1, 2.4 (requiring antidumping law to apply only after "[a] fair comparison . . . between the export price and the normal value" of a "product"); *see also The Impact of the Uruguay Round Amendments on U.S. Antidumping Law*, 5 Fed. Cir. B.J at 400-418, (explaining some of the additional restrictions imposed by Uruguay antidumping amendments, including sunset provisions to terminate old orders and *de minimis* thresholds for market impact); *see also* H.R. Rep. No. 103-826 at 46 (1994) (stating that one purpose of the amendments to the Antidumping Agreement was to provide "transparency and procedural fairness" and to ensure similar treatment for U.S. and foreign produced goods under the various antidumping laws of the member states).

The express limitations of 19 U.S.C. § 1673 (*e.g.*, to "merchandise" which is "sold" at "less than its fair value") were not an oversight. Rather, they reflect the view that the law is a narrow exception to the overriding U.S. interest in reducing trade barriers and must be carefully tailored to adhere to the United States' international obligations.[13] The statute should be strictly and narrowly construed to fulfill this purpose.

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[13] The same legislative history relied upon by Petitioners lends support to this understanding of the statute's purpose. *See, e.g.*, H.R. Rep. No. 93-571, at 4 (1973) ("H.R. 10710 will permit the United States to continue to exert leadership and new initiatives in international trade policy by recognizing both the overall benefits of continued trade expansion and requisites of equity and safeguards for our producing and consuming interests in international trade.").

IV. PETITIONERS' COUNTER-TEXTUAL INTERPRETATION OF 19 U.S.C. § 1673 IS NOT IN THE INTERESTS OF THE UNITED STATES

The antidumping law is a carefully worded, unambiguous statute that seeks to address certain well-defined behavior—foreign merchandise that is being sold in the United States at less than fair value. That behavior is not present in the transaction at issue. What is more, imposing dumping duties on uranium enrichment in disregard of the express statutory limitations would have potentially severe public policy repercussions.

Imposing unfounded duties on enrichment services would have an undesirable effect on the market for all stages in the nuclear fuel production chain. The uranium business is characterized by the use of long-term contracts. In entering into these contracts, foreign exporters like Kazatomprom rely on the express language and historical application of U.S. trade laws. A uniform and predictable treatment of those laws is fundamental to these business relationships—for both the exporter and the U.S. utility. Petitioners' unprecedented attempt to apply antidumping law to enrichment services would upset those relationships. If the Government is permitted to distort this plain language, all products from all countries will suddenly become subject to unpredictable outcomes and the whims of an agency instead of the law as drafted by Congress. Indeed, such a result would be particularly troubling with respect to Kazakhstan, the world's most abundant source of uranium, in light of the fact that Kazakh uranium is fairly traded and not subject to dumping

duties.[14] Imposing duties on enrichment would effectively amount to an indirect duty on Kazakhstan's abundant, fairly traded uranium, impairing U.S. utility access to that uranium at a time when the country can least afford it.

In that regard, reversal of the decision below would almost certainly result in higher prices for nuclear fuel, thereby exacerbating the energy crisis the United States is already facing. There is increased agreement among policymakers that nuclear power will be a key part of the United States' energy strategy in the 21st century, given that it offers an economically-viable, low-emission, safe alternative to dependence on fossil fuels.[15] In recognition of these advantages, American lawmakers have demonstrated strong bipartisan support for

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[14] *See supra*, n.2. The determination that Kazakhstan is not dumping is another example of a factor that both U.S. nuclear power companies and Kazakhstan have relied upon. Following that determination, Kazakhstan invested heavily in expanding its uranium mining and production capability. These efforts have been extremely successful, with Kazakhstan poised to become in the very near future the world's single largest supplier of uranium. Indeed, while Kazakhstan provided approximately 3% of the world's mined uranium in 1998, today it provides more than 15%, with a substantial portion of its output consumed in the U.S. market.

[15] *See, e.g.*, Statement of Dennis M. Spurgeon, Assistant Sec'y for Nuclear Energy, Before Sen. Comm. on Energy and Natural Resources (Nov. 14, 2007), http://www.ne.doe.gov/pdfFiles/testimony/Spurgeon_SENR_111407_Final.pdf ("Nuclear power is the only large scale, emissions-free source of baseload electricity currently available capable of meeting the growing demand.") (noting U.S. goal of "expanding the role of nuclear energy as a major component of our Nation's energy picture").

expanding the use of nuclear power.[16] Accordingly, the United States has authorized the construction of twelve new nuclear reactors, and proposals for an additional twenty are being considered by the Nuclear Regulatory Commissioner.[17] Permitting the Petitioners to extend the reach of the antidumping law to uranium enrichment contracts in violation of the unambiguous language of the statute would effectively increase the cost of nuclear fuel, contrary to the long term interests of the United States. *See, e.g.*, *Uranium from Kazakhstan*, Investigation No. 731-TA-539-A (Final), USITC Publ'n No. 3213 (July 1999), at 11 (noting that "the cost of [enriched uranium] fuel assembly rods represents a significant portion of a nuclear power plant's operating expenses").

The only beneficiary of such a wide-ranging and illegitimate tax on U.S. energy consumers would be USEC, one of the Petitioners and the sole enricher of uranium in the United States. Imposing dumping duties on foreign uranium enrichers would shield USEC from international competition and enable it

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[16] *See, e.g.,* Sen. Kay Bailey Hutchison (R-Tex.), Op-Ed, *Texas Can Lead Nuclear Renaissance,* Nueces County (Texas), Record Star, Aug. 15, 2008 ("Nuclear power must play a significant role as America strides toward an energy-efficient and independent future."); Rep. James Clyburn (D-S.C.), *More Drilling Not Long-Term Solution,* The Post and Courier (Charleston, S.C.), July 16, 2008 (noting that as "an unabashed advocate for policies that will end our dependence on foreign oil, enhance our national security, protect our environment and create new economies" the Congressman is "an ardent supporter of expanding our country's nuclear capacity").

[17] *See World Nuclear Power Reactors 2007-08 and Uranium Requirements* (Sept. 1, 2008), http://www.world-nuclear.org/info/reactors.html.

to charge higher prices. USEC and its shareholders, however, would be the only winners in this scenario. Their windfall would come at the expense of U.S. nuclear power companies and the American public – all without a statutorily permissible finding of dumping.

CONCLUSION

The Department of Commerce has overreached in attempting to apply antidumping law to the service of enriching uranium, adopting an unprecedented interpretation of the statute that is at odds with its text, with its historical application, and with U.S. international obligations. Moreover, this groundless extension of the law would have serious public policy repercussions, including potentially exacerbating an already looming energy crisis in the United States. Such significant harm would be offset by only one dubious advantage: strengthening USEC's monopoly power. The Court should uphold the decision below, thereby leaving to Congress's judgment the issue of whether "protecting" USEC is truly worth the tremendous cost.

The decision below should be affirmed.

Respectfully submitted,

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